IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIVIL ACTION No. 5009

AUTO TRANSPORTS, INC. COMPLAINANT, AND GENERAL MOTORS CORPORATION, INTERVENING COMPLAINANT

v.

UNITED STATES OF AMERICA, AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree entered on November 23, 1951,[1] by a specially-constituted District Court of three judges convened pursuant to Sections 2284 and 2325, Title 28 of the United States Code, dismissing appellants' complaint seeking to set aside an order of the

[1] The Court rendered its opinion and made findings of fact and conclusions of law on November 2, 1951, with District Judge Vaught dissenting. The opinions are not yet reported.

Interstate Commerce Commission entered May 17, 1950. Appeal was allowed on December 28, 1951. The appeal papers have not been served upon the Interstate Commerce Commission, except that copies of such papers, transmitted by the United States Attorney, were received by the Commission on January 6, 1952.

On July 12, 1946, the Commission granted Appellee, Auto Transports, Inc. temporary authority to transport new automobiles, automobile cabs and bodies, by the drive-away and truck-away methods,[3] in initial movements over irregular routes from points in Wyandotte County, Kansas to points in 15 mid-western and southwestern States, and between points in these States in secondary movements over irregular routes. This authority was made permanent by the issuance of a contract motor carrier permit to the carrier, on August 27, 1947, to perform the same service. Upon receipt of the aforesaid temporary authority appellant carrier entered into a contract with appellant General Motors providing for the transportation of automobiles from its plant in Wyandotte County to designated points in the territory just mentioned. The contract, copies of which were filed with the Commission pursuant to Section 220(a) Part II of the Interstate Commerce

---

[3] Drive-away means the car is transported under its own power and on its own wheels. Truck-away means transportation of cars in trailers on tractor-trailer units.

Act (49 USC 320 (a)),[3] provided for rates to 13 specific points on the basis of point-to-point rates per car and to all other points on a mileage basis. Appellant carrier has never had a contract for the transportation of property as a contract carrier with any other shipper than General Motors since it received the aforesaid authority.

Prior to the commencement of its aforesaid contract carriage operations appellant carrier filed with the Commission, as he was required to do under Section 218(a) of the act (49 USC 318(a)),[4]

---

[3] Section 220(a) provides in material part as follows: "* * * The Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this part. The Commission shall not, however, make public any contract, agreement, or arrangement between a contract carrier by motor vehicle and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: *Provided*, That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by motor vehicle as required by section 218(a), the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof.

[4] Section 218(a) provides in part as follows: It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually main-

a schedule of minimum rates and charges containing the minimum rates or charges "actually maintained and charged" for the transportation of property. The schedule of minimum rates and charges, filed as aforesaid, were the same as those contained in the contract. Although the schedule of rates has never been revised or amended the rates and charges contained in the original contract have been increased from time to time, to meet increased costs, until now they are considerably higher than those embraced in the aforesaid schedule [5].

---

tained and charged for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates, or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this part, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this part. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. * * *

[5] At the time an amended and revised contract, dated November 1, 1948, was presented to the Commission, it was examined by Commission officials and found to contain point-to-point rates per car to approximately 1500 destinations (with mileage rates to cover balance of points) all of which were higher than the charges specified in the schedule of minimum rates. This was true notwithstanding the fact that the schedule of minimum rates and charges in MF-ICC No. 1, still on file with the Commission, contains only 13 specific

After persistent and prolonged efforts had been made by the Commission to have appellant carrier correct its schedule of minimum rates, but with no success, the Commission instituted proceedings under the second proviso of Section 212(a) of the act (49 USC 312(a))[6] to suspend its permit until such time as the carrier had filed a schedule "containing the minimum rates or charges of such carrier actually maintained and charged" as required by Section 218(a) quoted in footnote, page 3 *supra*.

The Commission, by Division 5, issued its report on May 17, 1950, pursuant to which the order of suspension, of the same date, was entered.[7] The Commission found that appellant Auto Transports was not in compliance with the requirements of

---

point-to-point rates with the balance on a mileage basis all of which rates were lower than those provided by the amendments to the original contract. (Commission's report, p. 2, Exhibit "B" to plaintiff's complaint.)

[6] Section 212(a) provides in material part as follows: Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. * * * *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

[7] 51 MCC 600.

Section 218(a) and its own tariff circular MF-2,[8] and that by reason of such non-compliance "it is not lawfully maintaining a schedule of minimum rates and charges actually maintained and charged * * * as required by Section 218(a) and tariff circular MF-2, and the rules and regulations thereunder.[9]"

The appellants in the Commission proceedings as well as in the District Court contended that the Commission erred in its interpretation of Section 218(a) as requiring a contract carrier (with but a single shipper, such as Auto Transports) who has filed a schedule of minimum rates or charges reflecting the identical rates specified in a contract with the shipper, which contract was subsequently modified by increasing the rates to be charged, to reissue and file with the Commission a revised schedule to reflect the actual rates agreed to and charged in the revised contract. They contended that this interpretation (1) nullifies the confidential nature of motor contract carrier's contracts with a shipper, in violation of Section 220 (a), for

---

[8] Rule 7(p), Supplement No. 3 to MF No. 2, published March 18, 1943 (pursuant to Section 204(a)(6)) "Contract Carrier Schedules" provides: *Publication, filing, and posting of schedules*—(a) Schedules must be filed by contract carriers. (1) Contract carriers shall file schedules which conform to these regulations unless otherwise authorized by the Commission. (49 C.F.R. 187.7.) *Tables of Minimum rates or charges.* (1) The tables of minimum rates or charges shall be shown immediately following the rules, and shall state minimum rates or charges *actually maintained and charged.* (Emphasis added.) (49 C.F.R. 187.8.)

[9] 51 MCC 600, 604.

the reason that the actual rate charged in the contract is revealed (when the carrier has only one shipper) by the minimum schedule filed with the Commission which is open to public inspection as required by the statute; and (2) destroys the distinction between common and contract carriers, which Congress intended to preserve, particularly as respects the flexibility and freedom of contract and the distinction pertaining to the different standards of rate regulations applicable to such classes of for-hire motor carriers. Appellants cite these matters as constituting the "substantial" question presented for the determination of this Court as stated at pages 8 to 10, inclusive, paragraph V of their jurisdictional statement.

It is submitted that the legislative history of the act supports the Commission's interpretation of Section 218(a). This section as originally enacted required contract carriers to file schedules of only minimum rates and charges and prohibited the charging of a rate less than that contained in his minimum schedule.[10] The Commission soon

---

[10] The original motor carrier act (Part II, Interstate Commerce Act), which became effective October 1, 1935, provided in Section 218(a) (49 U.S.C. 318(a)), in part, as follows:

It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules, or in the discretion of the Commission copies of contracts, containing the minimum charges of such carrier of passengers or property in interstate or foreign commerce * * *.

found under the then existing law that contract carriers filed with it minimum rates which they never charged their shippers and never intended to charge and were in fact fictitious or paper rates having no relation to the charges received by the carriers. In the situation then prevailing, and obviously permitted by the law as then written, it was impossible for the Commission—charged with the duty of regulating these contract carriers—even to know the lowest charge the carrier was actually making for performing services for shippers. Thus the Commission was handicapped in carrying out the duty imposed by Section 218(b) of determining and prescribing a "just and reasonable minimum rate or charge"[11] for such carriers. In addition under these circumstances and under this state of the law it was also impossible for other contract carriers as well as for common carriers to know the true character of the competition by which they were confronted.

[11] Section 218(b) (49 U.S.C. Sec. 318(b)) provides:

Whenever, after hearing, upon complaint, or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle * * * for the transportation of passengers or property * * * contravenes the national transportation policy declared in this act, or is in contravention of any provision of this part, the Commission may prescribe such just and reasonable minimum rate or charge * * * as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part. Such minimum rate or charge * * * so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle. See *Cast-Iron Pipe Pennsylvania Points to New England*, 27 M.C.C. 737, 739.

The Commission recognized that before it could effectively exercise the right and duties delegated to it in connection with the prescription of just and reasonable minimum rates or charges of contract carriers, before it could protect other carriers from unfair competition in rates, and before competing common or contract carriers could even know the true character of the competition with which they were fa[illegible], it would be necessary to amend Section 218(a) in such a way as to require contract carriers to file schedules containing the minimum rates or charges actually maintained and charged. Accordingly, the Chairman of the Commission's Legislative Committee, the late Commissioner Joseph B. Eastman, on January 29, 1940, addressed a letter to the Chairman of the Senate Committee on Interstate Commerce, and the Chairman of the House Committee on Interstate and Foreign Commerce, recommending among other changes in the Motor Carrier Act that Section 218(a) be amended by inserting, after the clause providing that contract carriers shall file with the Commission their schedules of minimum rates, the words "schedules of minimum rates, fares, or charges actually maintained and charged.[12] "

---

[12] The letter was published by the House Committee, 76th Congress, 3d Session, and considered by both the house and Senate in connection with Senate Bill 2009, which was enacted into law as the Transportation Act of 1940. After quoting the proposed amendment which was subsequently adopted

In its consideration of the legislative history of Section 218(a) of the act the District Court stated that: [13]

> "Section 318(a) (49 USC) was deliberately amended to remove what the Commission thought was an evil inherent in the disparity between the posted schedule rate and the unpublished contract rate. The order of the Commission is in obedience to the Congressional mandate.

A search of the decisions of the Commission will reveal a uniform and settled construction of Section 218(a) as amended by the Transportation Act of 1940, to mean that a contract carrier by motor vehicle must file the lowest rates "actually maintained and charged" for transportation services

---

verbatim by Congress, the letter contained the following explanation of the reason for the amendment (page 27):

Important.—* * * The words "actually maintained and charged" are not in section 218(a) of Part II, and under that subsection schedules may now be filed containing minimum charges which are fictitious, i.e., which never have been and never will be charged. The words thus inserted will make it necessary to include in the schedules the lowest rates, fares, and charges, which are actually assessed, and hence the schedules will give competing common or contract carriers adequate notice of the true character of the competition by which they are confronted. (House Committee Print, Omnibus Transportation Legislation, Letter from the Chairman of the Legislative Committee Interstate Commerce Commission, 76th Cong., 3d Sess., U.S.G.P.O., Washington; 1940.)

[13] Mimeographed majority opinion, p. 5, attached to appellants' jurisdictional statement herein. See also the Commission's report pp. 602-3, containing reference to the conference report, Transportation Act 1940, Report No. 2832, 76th Cong. p. 79, reflecting views in the letter quoted.

rendered. See *Filing of Contracts by Contract Carriers*, 28 M.C.C. 75, 76; *Shipman Bros. Contract Charges, California and Idaho*, 30 M.C.C. 229, 231; *Contract Minimum Charges from and to Baltimore, Md.*, 32 M.C.C. 273, 287; *Petroleum Products from Wyoming Points to Missoula, Mont.* Ibid. 453; *Filing of Contracts by Contract Carriers*, 41 M.C.C. 527, 528.

The administrative interpretations, decisions, and practices of the Commission with respect to the meaning of the words "actually maintained and charged" are entitled to great weight.[14]

Only one Federal Court decision can be found bearing directly on the interpretation of Section 218(a).[15] The case referred to is Interstate Com-

---

[14] See *United States* v. *American Trucking Association*, 310 U.S. 534, 549; *Colgate-Palmolive-Peet Co.* v. *United States*, 320 U.S. 422, 426; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-89; *O. C. Wiley & Sons* v. *United States*, 85 F. Supp. 542, 544, affirmed 338 U.S. 902. While the only question involved in the instant case is one of law, the Supreme Court's decision in the most recent case on the subject of the weight to be given the Commission's interpretation of a statute, *Levinson* v. *Spector Motor Co.*, 330 U.S. 649, 672, is apposite, where the Court stated:

> As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for the administration and enforcement of this law, these conclusions are entitled to special consideration. * * *

[15] In the Betterman case (80A (2d) 66, 70, Cert. denied 96 L. ED. 32) relied upon by appellants, the rate filing provisions of the Pennsylvania Public Utilities Commission are unlike those of Section 218(a) of the Interstate Commerce Act. In the State act the requirement of Section 809(a) was that "No such contract carrier shall engage in the transportation of passengers or property unless the minimum

merce Commission v. John A. Ralston, doing business as Ralston Transport Co., (decided by the District Court, Southern District of Ohio, Eastern Division on October 25, 1950, not reported. However, a true copy of the Court's Memorandum is attached to this motion as Appendix "A".) The Court's decision in that case clearly supports the decisions of the Commission in its aforesaid interpretation of Section 218(a) of the act.

In respect of appellants' claim that the Commission's interpretation of Section 218(a) would result in the contract rates and charges being made public contrary to the provisions of Section 220(a), (which prohibits the Commission from making public any contract between a contract carrier and a shipper), we submit that such interpretation is not contrary to the Congressional intent. This claim is advanced in appellants' jurisdictional statement (p. 9) in support of their claim that this appeal presents a substantial question.

---

charges for such transportation by such carrier have been filed with the Commission, *or copies of all contracts* reduced to writing and filed with the Commission." Pennsylvania Public Utility Code 66 P.S. Sec. 1309(a). It will be seen that this statute is unlike Section 218(a) of the Interstate Commerce Act in two particulars. First, the State act does not require the filing of schedules containing the minimum rates and charges "actually maintained and charged" as required by the Interstate Act, and secondly, the State act requires the filing of either minimum schedules, or copies of written contracts with shippers, while the Interstate Commerce Act requires the filing of both the schedule and contract. The two statutes being dissimilar it is submitted that the interpretation of the state statute by the Supreme Court of Pennsylvania, (certiorari denied by this Court,) cannot be relied upon as a precedent in the instant case.

It will be observed from reading Section 220(a) that the confidential nature of the contracts required to be filed with the Commission is conditional and limited and qualified for the purpose of permitting the Commission to disclose their contents when necessary in the public interest and in the interest of enforcement of Section 218(a)[16]. It is clear that Congress intended by the language used in the proviso of Section 220(a) to indicate that the provisions of Section 218(a) are paramount and must override the qualified and conditional privilege of secrecy contained in Section 220(a). It is difficult to understand how this latter section operates to relieve a carrier from filing schedules of minimum rates. The schedule is not the contract and the requirement that minimum rates be filed and published is clear and definite.

Indeed the proviso in Section 220(a), that "if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by motor vehicle as required by Section 218(a), the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof" would seem plainly to indicate that the Commission is empowered to, not foreclosed from, making public rates shown in a contract which do not conform, as

---

[16] The proviso of Section 220(a), here pertinent, is quoted at footnote 3.

here, to the published schedule. For here it is conceded that the schedules do not reveal the minimum rates "actually maintained and charged" as required by Section 218(a) while the contracts do. In other words, nothing in Section 220(a) requires that actual minimum rates be kept confidential; on the contrary, the Congressional purpose to have such rates available to the public, either by schedule or publication of the contract rate, is clear.

In any event the only confidential information that would be disclosed as far as appellant carrier is concerned is the rate itself. But the rate is only one term of the contract. No disclosure is made of other provisions of the contract, such as volume of traffic offered, duration of the agreement, provisions for accessorial service, etc. Although the rate or charge is perhaps the most vital single term of the contract, it alone is hardly more important than the body of the remaining provisions. Under the Commission's decision in this case all these remaining provisions continue to be secret.

The disclosure complained of results from operation of the law and the Commission is powerless to change the law. If appellants desire to escape the effect of the statute they must apply to Congress for relief instead of the Commission or the Courts.

In respect of appellants' contention that the Commission's interpretation of Section 218(a) destroys the distinction between common and contract

carriers in regard to the flexibility and freedom of contract and particularly the distinction pertaining to the different standards of rate regulation applicable to such classes of carriers, appellees submit that the order has no such effect.

What appellants wish to accomplish is to obtain a ruling by this Court that would permit them, after *pro forma* compliance by the initial filing of a contract and schedule of rates and charges, immediately to enter into a new contract, refuse to file an appropriate schedule, and thereafter to be free to fix minimum rates, to prefer and discriminate in secrecy completely outside the knowledge of its competitors. It was to prevent such practices that the amendment of 1940 was passed.

The pertinent provisions of the statute, applicable to common and contract carriers[17] reveal numerous and significant differences wholly unaffected by the interpretation here in issue. For example appellant carrier may continue to "pick and choose" its customers; it may discriminate if it so desired in its services to its customers and its charges may be called in question only if they fall below a reasonable minimum level; it can contract freely with its customers; charge whatever rate it is able to negotiate with them, subject only to the requirement that the transportation performed pursuant to such contracts is authorized by its per-

---

[17] Sections 207, 208, 216, 217, applicable to common carriers, and 209, 218 applicable to contract carriers.

mit and that it keep on file with the Commission schedules containing reasonable minimum rates or charges which must be the rate "actually maintained and charged." Appellant carrier does not have to hold itself out to the public to carry for all who seek its services and it does not have to adhere to published rates as is required of common carriers. Neither do the provisions against discrimination, preference, or prejudice apply against contract carriers. Neither would it have to prove convenience and necessity in qualifying for operating rights, as is required of common carriers, but may secure a permit by a showing that its service will be consistent with the public interest and the national transportation policy. In fact the report and order of the Commission in no wise changes or alters the distinction between the rules, regulations, or requirements made applicable to common and contract carriers as separate and distinct types of transportation agencies.

Furthermore appellants urge (p. 9 of the jurisdictional statement) that the question presented on this appeal is substantial for the additional reason that the operations, contracts, schedules and permits of all contract carriers are involved; that the Commission's interpretation destroys the flexibility and freedom of contract inherent in contract carriage in that regulations of the Commission provide that no change may be made in published schedules of minimum rates and charges of con-

tract carriers except on 30 days' notice; and that the regulations require that in the filing of such schedules copies of the contracts involved must be filed at the same time, although subsequent contracts or amendments of prior contracts may be filed within 20 days.

There is no foundation whatsoever for the contention that operations, contracts, schedules, and permits of all contract carriers are involved in, or affected by the Commission's order herein. It is submitted that the carrier with only a single shipper is the only one affected. Illustrations of the operation of the statute and the applicable rules and regulations of the Commission with respect to the requirement for filing schedules of minimum rates and contracts are contained in Appendix "B" hereto. By reading these illustrations a clearer understanding will be gained of how the Commission's interpretation, with respect to the filing requirements of Sections 218(a) and 220(a), as well as with the Commission's own rules and regulations, apply to contract carriers having a single shipper as distinguished from such carriers having contracts with more than one shipper.

There is no substance to the claim that the Commission's interpretation of Section 218(a) destroys the flexibility and freedom of contract inherent in contract carriage in that the regulations prescribed in Rule 8(b) of the Commission's Tariff Circular

MF-No. 2[18] require that no change may be made in published schedules of minimum rates and charges except on 30 days' notice before they could become effective, with the possibility of further delay in the event the schedules are suspended under Section 218(c).

In respect of the alleged hardship which the appellants contend would result from the requirement of 30 days' notice, particularly when circumstances might warrant immediate increase or decrease of rates and charges in order to meet fluctuating costs, it is submitted that a complete answer to this allegation is found in the provisions of Section 218(a)[19] which provides that "the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules." In view of the Commission's reputation for reasonableness and fairness in matters of this sort and especially where, as here, there is statutory authority for the exercise of discretion, it is submitted

---

[18] Rule 8(b), Tariff Circular MF-No. 2, 49 C.F.R. 187.7(b) provides: *Required notice.*—Unless otherwise authorized by the Commission, all schedules of minimum rates or charges and supplements thereto shall be filed and posted at least 30 days prior to the effective date thereof.

[19] Section 218(a) provides with respect to the requirement of 30 days' notice: * * * but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules.

that there is no basis for any alleged destruction of flexibility.

As regards appellants apprehension that still further delay might result in the suspension of the schedules and the rates and charges being deferred pending notice and hearing under Section 218(c) [20] the Court's attention is directed to the provisions of this section which show clearly that this type of procedure obtains only when "any schedule stating a charge for a new service or a reduced charge" is sought to be filed. It does not apply to appellant carrier's situation at all.

There is also no substance to appellants' remaining allegations contained in their jurisdictional statement (pages 10-12) that the question presented in their appeal is substantial for the further reason that (1) the effect of the Commission's order destroys the distinctly different standards

---

[20] Section 218(c) provides that: Whenever there shall be filed with the Commission by any such contract carrier *any schedule stating a charge for a new service or a reduced charge* directly, or by means of any rule, regulation, or practice, for the transportation of passengers or property in interstate or foreign commerce, the Commission is hereby authorized and empowered upon complaint of interested parties or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such charge, or such rule, regulation, or practice, * * *. (Emphasis added.)

of rate regulations applicable to contract and common carriers by motor vehicle contrary to and in derogation of the established transportation policy, and (2) that it results in discriminatory subclassifications of contract carriers.

Respecting (1) above, Congress, in its examination of the statute obtaining prior to the 1940 amendment, and the operations of contract carriers thereunder, changed the law deliberately to confer upon the Commission the power here exercised and complained of. Treating the question raised in (1), the District Court gave an entirely adequate and satisfactory answer to the point in its opinion (page 5) wherein it stated:

> "It is true that the Commission's order has the effect of construing Section 318(a) to require a contract carrier to file and publish a schedule of rates and charges which it actually maintains and charges any one shipper, and since Auto has a contract under its permit with only one shipper," the order has the rather anomalous effect of requiring it to actually charge that shipper the rates filed and published in its schedule." In other words, the contract rate must be the reasonable minimum scheduled rate, or vice versa." But, this does not prohibit Auto and intervenor from contracting for any rate they choose, so long as they file the schedule showing such rate to be the posted minimum reasonable rate."

Section 318(a) was deliberately amended to remove what the Commission thought was an

evil inherent in the disparity between the posted schedule rate and the unpublished contract rate. "The order of the Commission is in obedience to the Congressional mandate." If the requirement for posting the schedule of minimum rates at least thirty days prior to the effective date works a hardship, the Commission is authorized to ameliorate it. In any event, the requirement does not destroy the validity of the Commission's order.

Appellants contend that the Commission's interpretation of the law identifies the "minimum rate actually maintained and charged" as being also the maximum rate. But Congress, by amending Section 218(a) in 1940 so as to require the filing of the "minimum rate actually maintained and charged," gave recognition to practical conditions in contract carriage and undoubtedly intended the consequences of which appellants complain.

In regard to appellants' contention that the Commission's interpretation of Section 218(a) results in discriminatory subclassification of contract carriers it is insisted that there is no basis for such a contention. Such status as appellant carrier may occupy results from its chosen type of operation and from the contract it voluntarily entered into, and not from any action required of it by this Commission.

The same contentions, expressed in appellants jurisdictional statement and relied upon in support of their claim that the appeal presents a sub-

stantial question, were made before the Commission and the District Court and decisively rejected by both tribunals.

For the foregoing reasons it is clear that the appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington, D. C.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission,
Washington, D. C.

JANUARY 1952.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 2780

INTERSTATE COMMERCE COMMISSION, PLAINTIFF

v.

JOHN A. RALSTON, doing business as
RALSTON TRANSPORT COMPANY, DEFENDANT

MEMORANDUM

This is a suit wherein the Interstate Commerce Commission seeks to enjoin the defendant from transporting property by motor vehicle in interstate commerce over and on the public highways under individual contracts or agreements for compensation, whether over regular or irregular routes, unless and until such time as the said John A. Ralston actually maintains and charges the rates set forth in the schedule of minimum rates and charges filed with the Commission and published and kept open to public inspection showing minimum rates and charges for transportation and all service in connection therewith of property in interstate or foreign commerce.

The complaint alleges that defendant has been charging more than the minimum rates which defendant had filed with the Interstate Commerce Commission. The answer of defendant admits the factual allegations of the complaint but denies that there has been any violation of law. This case was

submitted to the Court on a Stipulation of Facts and the Court having carefully considered the same, together with the pleadings and briefs, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That said defendant transported the shipments of property by motor vehicle in interstate commerce over the public highways under an individual contract and agreement with Quaker State Oil Refining Corporation, which contract is duly filed with and accepted by the Interstate Commerce Commission, from St. Marys, West Virginia to points of destination shown in Exhibit A, attached to said Complaint, on the dates shown in said Exhibit A, and received as compensation therefor, the sums of money set forth in said Exhibit A, which sums of money are greater than the rates set forth in the schedule shown in Exhibit B, attached to the said Complaint.

2. That in no instance set forth in said Exhibit A did defendant, John A. Ralston, charge or receive as compensation an amount which is less than the amount required under the schedule of minimum rates and charges duly filed and published with the Interstate Commerce Commission, which schedule of minimum rates and charges is shown on Exhibit B, attached to plaintiff's Complaint.

3. That in bringing this civil action the Interstate Commerce Commission is relying on Sections 218 and 222 of the Interstate Commerce Act in their entirety, which are otherwise known as Title 49, U.S.C., Sections 318 and 322, respectively, and

also upon Section 220(a) of said Act, also known as Title 49, U.S.C. Section 320(a).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this suit.

2. Title 49, Section 318(a) requires that defendant actually maintain and charge rates set forth in a schedule of minimum rates and charges filed with the Interstate Commerce Commission.

3. Since defendant has been following a course of conduct which indicates a continuing failure to comply with Section 318(a) of Title 49, it is probable that such lack of compliance will continue unless an injunction is issued against defendant.

4. A permanent injunction should issue enjoining defendant from in any manner directly or indirectly transporting property by motor vehicle in interstate commerce over and on the public highways under individual contracts or agreements for compensation, whether over regular or irregular routes, unless and until such time as the said John A. Ralston actually maintains and charges the rates set forth in a schedule of minimum rates and charges filed with the Commission and published and kept open to public inspection showing the minimum rates and charges for the transportation, and all services in connection therewith, of property in interstate or foreign commerce.

Entry accordingly.

(S) MELL G. UNDERWOOD,
Judge, U. S. District Court.

APPENDIX B

Illustrations of the Operation of the Commission's Rule Relative to the Filing of Schedules of Minimum Rates and Charges and Copies of Contracts

The Commission's tariff regulation pertinent here (49 C.F.R. 187.8), states that "The tables of minimum rates or charges shall be shown immediately following the rules, and shall state minimum rates or charges actually maintained and charged.[21]" It will immediately be observed that the last four words are taken bodily from Section 218(a) as amended by the Act of 1940. In actual practice, as well as in the rule, there is no discrimination against a carrier because of size or number of contracts. Contrary to plaintiff's contention, the Commission requires a schedule change only when a change occurs in the minimum rate or charge.

All contract carriers must file copies of all subject contracts held and, in addition, schedules reflecting the minimum rates therein. While the contracts remain secret, the schedules are open to public examination, including examination by competitors. Illustrations of the operation of the rule follow:

Carrier A, holding a single contract for the transportation of a single commodity must file with the Commission (1) a copy of the contract and (2) a schedule showing the minimum rate actually

[21] Tables of minimum rates or charges. (1) The tables of minimum rates or charges shall be shown immediately following the rules, and shall state minimum rates or charges actually maintained and charged. (Emphasis added.) (49 C.F.R. 187.8.)

maintained and charged for transporting that commodity under the contract. Carrier B holding a single contract for the transportation of three commodities must file with the Commission (1) a copy of the contract and (2) a schedule showing the minimum rate actually maintained and charged for transporting each of the three commodities under the contract. Carrier C holding three contracts, one with each of three shippers, for three different commodities, must file with the Commission (1) a copy of each of the three contracts and (2) a schedule showing the minimum rate actually maintained and charged for transporting each of the three commodities under the three separate contracts. He might, if he chose, file three schedules, one for each contract.

If carrier A, by contract amendment, decreases the minimum rate on the single commodity embraced in its contract the schedule must be correspondingly amended. If by like method it increases the minimum rate, the schedule must be correspondingly amended. This is necessary to observe the injunction that a schedule of rates "actually maintained and charged" must be filed.

If carrier B, by contract amendment, decreases the minimum rate on one or more of the three commodities embraced within the terms of its contract, the schedule must be correspondingly amended. If by like method it increases the minimum rate on one or more of the three commodities embraced within the terms of its contract, the schedule must be correspondingly amended. As in the case above, this is necessary to observe the injunction that a schedule of rates "actually maintained and charged" must be filed.

If carrier C, by contract amendment, decreases the minimum rate on one or more of the three different commodities embraced within the terms of its three separate contracts, the schedule must be correspondingly amended. If by like method it increases the minimum rate on one or more of the three commodities embraced within the terms of its contracts the schedule must be correspondingly amended. As with carriers A and B, this is necessary to observe the requirement that a schedule of rates "actually maintained and charged" must be filed.

No discrimination is worked as between carriers holding one contract and those holding more than one. Any seeming generality of tariff rule apparent in the illustrations given arises from the statutory treatment of contract carriers, but it cannot be said that either the statutory language or the pertinent regulations of the Commission imposes upon a carrier with a single contract any discrimination, nor does either require the filing of schedule changes where the minimum charge remains fixed.

Endorsed: Filed in District Court January 22, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952

INDEX.

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	5
Argument	7
(a) The authority of the Interstate Commerce Commission	8
(b) Appellees' interpretation of the act erroneous	13
(c) Statutory classification of carriers ignored by appellees	18
(d) The substantial question	24
Conclusion	26
Appendix A. Section 318 (a), Interstate Commerce Act	31
Appendix B. Section 320 (a), Interstate Commerce Act	33
Appendix C. Sections 187.0 and 187.8, Code of Federal Regulations, Title 49	34
Appendix D. Sections 173.1 and 173.2, Code of Federal Regulations, Title 49	36
Appendix E. Section 318 (b), Interstate Commerce Act	38
Appendix F. A bill to require the establishment of actual rates by contract carriers, S. 2752, in the Senate of the United States	39

Cases Cited.

Arizona Grocery v. Atchison Ry., 284 U. S. 370..... 17
Auto Transports v. United States, 101 F. Supp. 132.. 1

Betterman v. American Stores, 80 A. (2) 66, certiorari denied by this court October 8, 1951, Case No. 190, 96 L. Ed. 32..... 15

Cast Iron Pipe, Pennsylvania Points to New England, 27 M. C. C. 737 (1941)..... 10
Classification of Motor Carriers, 2 M. C. C. 703..... 8

Miller v. United States, 294 U. S. 435, 441..... 17

New England M. Rate Bureau, Inc., v. Lewers and McCauley, 30 M. C. C. 651 (1941)..... 20

Order of Conductors v. Swan, 329 U. S. 520, 525..... 29

Petroleum Products, Wyoming Points to Missoula, Mont., 32 M. C. C. 453 (1942).....14, 19, 20, 21

Trade Commission v. A. P. W. Paper Co., 328 U. S. 193, 202 24

U. S. v. Amer. Trucking Assn., 310 U. S. 534, 544..... 16
United States v. Mo. Pac. R. Co., 278 U. S. 269, 281... 29
United States v. Powers, 307 U. S. 214, 217..... 27
United States v. Sullivan, 332 U. S. 689..... 27

Statutes Cited.

Code of Federal Regulations, Title 49:
Secs. 173.1-173.6 .....4, 36
Sec. 173.1 36
Sec. 173.2 36
Secs. 187.0-187.10 .....4, 34
Sec. 187.0 34
Sec. 187.8 34
Interstate Commerce Act, Title 49, U. S. C. 301 et seq.:
Sec. 303 (14) 2
Sec. 303 (15) 3

Sec. 304 (b) 8
Sec. 309 3
Sec. 312 (a) 6
Sec. 317 (b) 18
Sec. 318 (a) 2, 3, 4, 5, 7, 9, 12, 13, 19, 22, 31
Sec. 318 (b) 4, 9, 10, 38
Sec. 318 (c) 16
Sec. 320 (a) 2, 4, 23, 33
Senate Bill S. 2752, a Bill to Require the Establishment of Actual Rates by Contract Carriers.....13, 39
U. S. Code, Title 28, Secs. 1253, 1336, 2321 and 2325.. 2